IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 522

JULIUS BASCOM MCBRIDE, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

This Reply Brief is made necessary because the Government's Brief in Opposition (hereinafter cited as "Gov. Br.") so avoids the principal issues that it is necessary to restate them and explain how the purported answers strike very wide of the mark.

I. The first point raised in the Petition was that both the spirit and the letter of 18 U.S.C. § 4244 had been violated, because Petitioner had never been given a psychiatric examination for possible insanity or mental incompetency *during the trial.* The Government in effect concedes that such examination is "mandatory upon the court once a motion to that effect is made by the United States Attorney." Gov. Br., 10. But the Government would have the Court believe that such an examination was made in this case. There is no basis in fact for the Government's position.

The Government has lodged two purported "phychia-

trists' reports" with the Clerk of the Court. There is not one word in these reports which considers whether or not the Petitioner was sane or competent *at the time of the trial.* There is no trace of psychiatric consideration directed to determining whether Petitioner was "so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense", which the statute defines as the crucial issue, *at the time of the trial.*

The only fact that these reports do emphasize is the one already before the Court, namely, that the Trial Judge relied on no psychiatric reports for his own unsupported, offhand conclusion that Petitioner was sane and competent, *at the trial.* Even the Government recognizes that there was no determination of competence at, or even retroactively as of, the time of the trial.

These "reports" are those made at the time of sentence. The most the Government can do is to allege that "on the basis of this examination, the court concluded that petitioner was competent, *and sentenced him.*" Gov. Br., 10 (emphasis added).

But competence to be sentenced and competence to be tried are two completely different things. As defined in the very cases which the Government cites as condoning the admitted error in this case, proper judicial procedure requires that Petitioner be competent at two separate times, "*when he was tried* and when he was sentenced." *Gunther* v. *United States,* 215 F. 2d 493, 497 (C.A. D.C., 1954); *Taylor* v. *United States,* 222 F. 2d 398, 401 (C.A. D.C., 1955). (emphasis added.) In both these cases, there had been an actual judicial determination of competence to stand trial based upon psychiatric examination addressed to a different time, but the Court insisted that there be psychiatric examination bearing precisely on the issue of competence to stand trial *at the time of trial.* The authority cited by the Government should indeed govern this case, and it requires reversal and remand here, as in the cases cited.

The issue affecting substantial rights is whether Petitioner "was, in fact, incompetent *at the time of trial*". *Gunther* v. *United States, supra, ibid.* (emphasis added.)

Section 4244 "must be interpreted broadly enough to give effect to the apparent purpose of Congress that the question of competence to stand trial may be determined, at a judicial hearing distinct from the trial itself * * *." *Taylor* v. *United States, supra,* at 403. Even under the Government's version of the facts, that Congressional purpose was not satisfied in this case.

The Government's procedure here is instructive. Neither these reports nor any references thereto appeared in the Recordb elow, so that the Government's belated attempt to insert them in the Record seems obviously improper under Rule 21 of this Court. There is no support anywhere on the record for the bland assertion that the authors of the letters submitted were "reputable psychiatrists." Gov. Br., 10. Further, one letter, that of Dr. Skoglund, shows on its face that there was an enclosure, but no enclosure has been filed with the Clerk.

This covering letter does say that "I do not find evidence of a psychosis nor of any other type of mental deviation which has impaired either his thinking or his understanding of the reasonable consequence of his actions." Obviously, this does not consider, and *a fortiori* does not attempt to answer, the question of whether Petitioner was competent to understand the proceedings against him and to assist in his own defense, at the trial.

Moreover, the other letter, which is presumably submitted in its entirety, obviously relies upon a test of sanity which the Court of Appeals for the District of Columbia has expressly discarded, in a decision to which the Solicitor General has given public approval. This letter, by Dr. Greenwood, concludes, "Although he recognizes the difference between right and wrong, I believe that he would probably make mistakes in the future." The right-or-wrong test for sanity or competence—necessarily for use at any time; before and after, as well as during the trial—was discarded in *Durham* v. *United States,* 214 F. 2d 862 (C.A. D.C., 1954), which was enthusiastically acclaimed in Sobeloff, *Insanity and the Criminal Law: From McNaughton to Durham, and Beyond,* 41 A.B.A.J. 793 (1955). In any event, whether

Dr. Greenwood was right or wrong, he obviously was not concerned at all with the question whether Petitioner was sane or competent *at his trial.*

If materials lodged with the Clerk at this stage are properly before the Court, Petitioner has also now submitted certain documents for the Court's consideration. These bear upon the issue of whether the "psychiatrists' reports" proferred by the Government are responsive to the issue of Petitioner's mental state *at his trial.*

First, the Order of the Trial Court for the examination is submitted. This reveals the utter absence of any instructions to these doctors. Clearly there is no request for any examination or finding bearing upon Petitioner's mental or emotional state at his trial.

Further, the validity of the examinations made is called into question by two affidavits filed with the Clerk. One is that of the neurosurgeon who has been treating Petitioner over the years; this affidavit of Dr. James Albert Brown, *inter alia,* discloses that the probation officer was informed that Dr. Brown believed that Petitioner was irrational. There is nothing to indicate that the Trial Court was aware of this opinion, even at the time of sentencing.

The other affidavit is that of Petitioner himself. Ordinarily this would not be tendered the Court, as presumably self-serving; but it must be remembered that the Trial Court rejected the Government's motion under 18 U.S.C. § 4244 ultimately upon Petitioner's own "medical opinion" that he was sane. (R., 796). With his testimony thus relied on by the Court as that of an expert on psychiatry and on the sanity of Julius Bascom McBride, Petitioner's affidavit is entitled to substantial consideration, when he evaluates these "psychiatrists' reports." Petitioner states that he did not recognize the examinations by these two doctors to be psychiatric examinations; instead, they were so brief and cursory that Petitioner took them to be X-ray checks and did not even inform his present counsel concerning them.

It is true that one of these Government "psychiatrists" (Dr. Greenwood) declared that Petitioner's "judgment is

not good, and I would doubt his competence to practice medicine." The fact is, however, that the Trial Judge expressly relied on Petitioner's medical judgment, at least *during the trial.*

Competence to be sentenced is different from competence to stand trial. There is a difference in time: a defendant who was in fact insane during the trial might have sufficiently recovered to be adjudged sane at the time of sentencing. There is a difference in the context of psychiatric examination: since the examination is requested for the purpose of sentence, the psychiatrist knows that the subject has already been convicted—presumably in a trial during which he was adjudged clearly and definitely sane and competent—and the psychiatrist must feel that he is asked only to make a general report for sentencing, and not to make a specific finding and examination addressed precisely to the issue of competence at the trial. There is a difference in judicial function: a Judge might sentence a convict more leniently, or as in this case to Springfield, if the reports suggested any type of mental or emotional weakness or impairment; while the Court might feel that only certain types or levels of mental incompetence would justify suspending or withholding the trial itself.

Congress recognized this difference. Section 4244 demands that the examination proceed forthwith, and be addressed to sanity or competence at the trial. The Judge must cause the psychiatric examination to be made "upon" the motion of the United States Attorney; and the judicial determination of sanity or competence shall not "be admitted in evidence", and "shall in no way prejudice the accused in a plea of insanity * * * nor otherwise be brought to the notice of the jury." It is virtually impossible to read this language as sanctioning psychiatric examinations at some later time in the Judge's discretion, rather than immediately. Certainly there is no Congressional wording which condones any delay in examination until *after* the trial.

Section 4244 establishes an admittedly mandatory procedure for insuring that no defendant who is incompetent to understand the nature of the proceedings against him or

to assist in his own defense shall ever stand trial in a Court of the United States. Because the Judge admittedly deviated from Section 4244, that may have happened in this case. No psychiatrist has ever been instructed to determine, and none has found, whether or not Petitioner was actually sane or competent *at his trial.* Suggesting that he was sane or competent at some other time does not satisfy Section 4244.

This is no harmless error, as the Government would casually prefer to have this Court believe. Here the United States Attorney believed in good faith that Petitioner was insane or incompetent at his trial. No psychiatrist has ever examined Petitioner for the purpose of judging whether the United States Attorney was right. The Trial Court has made no pretense of complying with Section 4244, either at or after the trial.

If this case should stand unreviewed, Section 4244 could be diluted beyond recognition of the clear Congressional intention. Trial Courts would be encouraged to push trials on to their conclusion, rather than to interrupt them, before ordering a psychiatric examination. This would almost certainly tend to weight the psychiatrists' minds against a finding of insanity or incompetence. For this and other reasons, Congress clearly intended no such result. What transpired in this case contravenes both the spirit and the letter of Section 4244.

The issue is one of general importance, affecting as it does all Federal criminal trials wherein the competence of defendants may be in issue; and the decisions of the Court of Appeals for the District of Columbia are in clear and square conflict with the proceedings at bar. This Court should grant certiorari, and should forthwith reverse, and remand for psychiatric examination and for judicial determination, upon fair hearing, in accordance with Section 4244, of the question whether Petitioner was sane and competent *at his trial.*

II. The second issue raised in the Petition was whether the Trial Judge had so governed the trial as to maintain the minimally requisite atmosphere of judicial calm. It

was contended that special judicial care was required, because of the physical and mental failings of the Petitioner; but it obviously was not provided.

What is the Government's answer? It certainly is no affirmative statement that the Trial Judge afforded Petitioner every respect and protection to which he was entitled. The Government concedes that the Court indulged in "unnecessary" remarks. Gov. Br., 12. And it admits that "laughter * * * was frequent during petitioner's entire testimony." Gov. Br., 13. While alluding to Petitioner's "speech impediment" as presumably causing this frequent laughter, Gov. Br., 12-13, and while now offering the Court "psychiatrists' reports" that reveal Petitioner as something less than completely normal, the Government makes no claim that the Trial Court took these considerations into account.

Indeed, the Government in effect concedes that the Court called attention to Petitioner's defects, without taking any action to protect him against prejudicial jury inferences. For the Government attempts to justify the Court's conduct as necessary repetition of what Petitioner said, because of his speech defect. Even if this were true, it would reveal such an inability to govern the proceedings calmly and dispassionately as to vitiate the entire proceedings.

It is not true, however, that the Trial Judge contented himself with repetition he regarded as necessary. He did not repeat; he extemporized. He was no echo, but an independent and superior wit.

In the one exchange quoted in the Government text, Gov. Br., 14, for example, the point of Petitioner's testimony was that Morrison was allergic; but the Court generalized that "Blonds are allergic to everything." And his subsequent intensification of the witticism, "Probably allergic to water", has absolutely no referent in the remarks of Petitioner. This was not neutrally "unnecessary", as the Government prays the Court to believe. It was a remark undertaken on the judicial initiative, reflecting the good spirits of the Court himself—at Petitioner's expense.

Likewise, there is no impartial repetition in the colloquies

quoted in fn. 5, Gov. Br., 11-13. These reveal an aggressive judicial bantering, taking the jury's attention completely away from the substantive point of Petitioner's testimony.

In the first instance, Petitioner was obviously trying to explain that Chief Morrison was doing a fine job, and had introduced worthwhile reforms in his administration of the police department. The Court seized on one minor aspect of this, which the Petitioner had intended only as a practical illustration, and he embellished it by adding, "He won't let them accept it free." This is not repetition; it is addition, lest the jury miss the point of the joke—and lest it get the point of the testimony.

In the second instance, the Judge mocked what was nothing less than an embarrassed apology by the Petitioner for his inability to think clearly. Petitioner's humble "I'm sorry I'm excited" became a jeering "He says he's a little excited. He says he's a little excited. (Laughter)." This is repetition, not the neutral once to clarify, but the partisan twice to mock and ridicule. Again, in the next instance, Petitioner begged for guidance from the Judge, only to be rebuffed by the aggressive judicial wit. "Am I doing wrong now?", in a process which the Government describes as only "reiterations by the court of Petitioner's answers", brought forth "Your lawyer will—I can't coach you. Your lawyer will have to—he says, 'Am I doing wrong?' (Laughter)."

Further, when the Court declares "He is telling me that he thinks I am right, for the moment", there is nothing upon which the Government can fasten any claim of "reiterations". This remark means nothing other than: "Imagine: This defendant, this pitiable and handicapped wretch, presumes to judge whether I am right or wrong—*me*, a Federal Judge!"

Even on the cold record, it seems clear that such personal involvement of the Court cannot be condoned. The Government's unsupported generalizations from the Record cannot conceal the fact that the Court did in fact ridicule Petitioner, irresistibly directing the attention of the jury

to Petitioner's personal failing, and distracting it from the genuine merits of the case. The Trial Court did not properly govern the trial, to preserve an atmosphere of judicial calm and the appearance of impartiality, as was required by due process and the decisions of this Court.

III. In its third point, the Petition argued that Petitioner had been convicted for failing to comply with "standard medical practice", a standard not to be found in the statute or in the decisions of this Court. The answer misreads the charge, is inadequate even on its own interpretation of the charge, and is erroneous under the cases it cites.

We still believe that the charge, fairly read, is capable only of being interpreted as making conformance to "standard medical practice" the only criterion; there is nothing to add on that score. Even if the Government were correct, "standard medical practice" and "good faith" were "coupled". Gov. Br., 16. In other words, it was necessary for the jury to make *two* findings, in order for Petitioner to be considered within the statutory exemption. Unless Petitioner acted in good faith *and* in accordance with standard medical practice, he was covered by the statutory prohibition and eligible to be found guilty. The error of the Trial Court is thus even more egregious under the Government's reading of the charge.

The scope of the exemption which is at issue here should be restated, because of an inadvertent possible effect of confusion in the manner of Petitioner's wording of Questions 3 and 4 of the "Questions Presented", upon which Point III depends. Pet., 3, 23-28. While the Petition is written as if only the "record keeping" requirements were involved, this was only an elliptical method of reference to the two provisions of the statute, dispensation and record keeping. The Questions and discussion were intended to be applied to both, and were evidently so taken by the Government. Gov. Br., 15-17. The basic provision of the statute is to prohibit dispensation of drugs except upon certain order forms. From this dispensation requirement exemption is made of dispensations "by a physician * * * in the course of his professional practice only." Even on these dispensa-

tions, however, records must be kept, "except [of] such [drugs] as may be dispensed * * * to a patient upon whom such physician * * * shall personally attend." 26 U.S.C. § 2554. The references in the Petition to the exemption for dispensation "by a physician * * * in the course of his professional practice only * * * to a patient upon whom such physician * * * shall personal attend" were intended to cover both exemptions in the statute. Obviously, Petitioner contends that if the charge on this issue had been validly given, there could not have been a valid conviction on *any* count.

"Good faith" is, of itself, a neutral term. It must be given content and context—good faith toward what end, in what course of conduct? Certainly Petitioner would have been satisfied by the charge quoted in *Linder* v. *United States*, 268 U. S. 5, 17, that "If, on the other hand, you believe from the testimony that the defendant believed in good faith this women was suffering from cancer or ulcer of the stomach, and administered the drug for the purpose of relieving her pain, or if you entertain a reasonable doubt upon that question, you must give the defendant the benefit of the doubt and find him not guilty." And Petitioner would have been content with the charge quoted in *Boyd* v. *United States*, 271 U. S. 104, 107-108, that "* * * in determining whether or not the defendant in prescribing morphine to his patients was honestly seeking to cure them of the morphine habit, while applying his curative remedies, it is not necessary for the jury to believe that defendant's treatment would cure the morphine habit, but it is sufficient if defendant honestly believed his remedy was a cure for this disease." While the Government relies on these cases, Gov. Br., 17, there simply is no relationship between them and the charge actually delivered in this case, which made *no reference to the honest beliefs of Petitioner.*

The very point of Petitioner's complaint in Point III is that his honest belief in the medical benefits he was bringing to his patient should expressly have been brought to the attention of the jury, as they were in *Linder* and *Boyd*, and not hidden or obscured by an equation or coupling of "good

faith" with "standard medical practice". Petitioner would simply not have submitted this point to the Court if there had in fact been the compliance which the Government implies with *Linder* and *Boyd*.

It may be true that "Standard medical practice is * * * one factor which the jury could properly take into consideration in determining the issue of whether the dispensations were in the course of a physician's professional practice," Gov. Br., 17, but it is false to imply that the Trial Court so charged. It made conformance with "standard medical practice" *the* primary factor, and either the only criterion or a criterion coupled with "good faith". The statutory standard, as explained in the cases cited by the Government, emphasizes the personal intent of the defendant physician, a factor conspicuously absent from this charge.

The Government does not deny the statement in the Petition that "This is apparently the first case in which a physician has been convicted for prescriptions which he himself believed were helpful and non-addictive, and which were made in the course of practice and treatment of a genuine patient." (Pet., 26). Limiting the jury's consideration to "standard medical practice" was obviously error. This Court should not permit a conviction based thereon to stand.

IV. Again in its answer to point IV of the Petition, the Government's answer is to evade the chief issues presented by each of the three statutes under which Petitioner was convicted.

On 18 U.S.C. § 1001, the Government continues to rely on *Walker* v. *United States*, 192 F. 2d 47 and *Mitchell* v. *United States*, 143 F. 2d 953, in ignorance of or indifference to the basic distinctions pointed out in the Petition, pp. 32-33. If the Government had made any attempt to meet the substantive merits of Petitioner's contentions, its assurance would be at least understandable, even if obviously misplaced. In the absence of any such attempt, its statements are unsupported self-serving generalizations.

The two other statutes, 18 U.S.C. § 494 and 26 U.S.C. §

3793 are discussed as one by the Government, Gov. Br., 19, possibly because there is no way of contending that the charge under the former statute, considered alone, was valid. Although 18 U.S.C. § 494 requires that there be no conviction unless there is a "purpose of defrauding the United States", the Trial Court did not discuss this crucial phrase. It did not charge that the jury need find any "evil intent" whatever. Instead, it charged that the jury could convict if only it found that the admitted act of writing Jackson's name for Morrison's was done "deliberately and voluntarily". Precisely this approach was condemned by an unanimous Court in *Morrisette* v. *United States*, 342 U. S. 246, as explained at pp. 35-36 of the Petition. The Government had no stomach for this point, perhaps hoping that its failure even to mention *Morrisette* would induce this Court to overlook the fundamental precepts of that case.

Nor did the Government deign to mention *Sullivan* v. *United States*, 178 F. 2d 723 (C.A. D.C., 1949), with which the decision below is in square conflict. See Petition, pp. 36-37.

Finally, with regard to 26 U.S.C. § 3793, there is at best a confusion and inconsistency in the instructions. The jury was told both that "evil intent" must be found (which they were *not* told under 18 U.S.C. § 494) and that the mere doing of the physical act was enough. In the face of this contradiction and confusion, it requires an extremely pugnacious advocacy to cite *Opper* v. *United States*, 348 U. S. 84, 95, where, in a joint trial of two defendants, this Court upheld a conviction only on the finding that "The trial judge here made clear and repeated admonitions to the jury at appropriate times * * *." Here there was no clarity, and certainly no repetition of the correct statement of the law, on 26 U.S.C. § 3793, or on any other subject.

* * * * *

If the Court declines to review this case, the Government will have "won" another conviction. Under a scorecard theory of jurisprudence, this victory would be triumph enough. But a Federal criminal defendant will have been tried without any determination of whether he was insane

or incompetent at the time of his trial. And even his belated and cursory examination by psychiatrists will have proceeded under a legal test of insanity publicly condemned by the Solicitor General. Further, that Petitioner will have been tried by a Judge who mocked and ridiculed him. He will have been convicted in effect for not having submitted his professional judgment in treating a patient to a vague "standard medical practice", a test unwarranted and unauthorized by any statute. He will have been convicted of a crime under a standard of criminality which expressly excludes "evil intent", even under statutes expressly requiring the purpose "to defraud the United States". His trial and sentencing will have been conducted under rules of law flatly inconsistent with decisions of the Court of Appeals for the District of Columbia and of this Court.

All this seems worthy of review, and reversal, by this Court, under the preferable theory of the proper role of Government in criminal cases: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U. S. 78, 88 (1935).

CONCLUSION

For the reasons stated in this Reply Brief, and appearing elsewhere in the record of this cause, the petition for certiorari should be granted.

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ADDENDUM

Petitioner is filing with the Clerk of this Court a certified copy of the sentencing proceedings, which was received by counsel after the printing of this Reply Brief. This transcript, which was ignored by the Government, is of the utmost significance. It completely destroys the primary basis for the Government's opposition on the first issue in the Petition.

As its primary rebuttal to Petitioner's claim of flagrant violation of 18 U.S.C. § 4244, the Government lodged with the Clerk of this Court two letters purporting to be "psychiatrists' reports". It is now clear that the Trial Court did not so regard them.

The Trial Court refers to these "psychiatrists" as only "neurosurgeons". Reporter's Transcript of Proceedings of November 26, 1954, p. 11. Obviously, whatever the Government may believe or state to this Court at this time, the Trial Court did not purport to rely on any reports by psychiatrists.

Further, this transcript makes absolutely clear that the Trial Court made no finding that Petitioner was sane or competent, *during the trial.* Quite the contrary, it is unmistakably evident that the Trial Court gave no consideration whatever to this issue.

What the Trial Court believed and did is crucial. The Government may believe—and it may even be objectively true—that these doctors are psychiatrists. On this record, however, they are certainly not shown to be "qualified psychiatrists", as is required by the statute. Now the record demonstrates plainly that the Trial Court tried and sentenced, without submitting Petitioner to an examination under 18 U.S.C. § 4244, or to any examination by doctors whom the Trial Court thought of as "psychiatrists", let alone duly "qualified psychiatrists".

This procedure constitutes a complete departure from that made mandatory by 18 U.S.C. § 4244. The petition

for a writ of certiorari should be granted, and the judgm of conviction, affirmed below, forthwith reversed.

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